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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KATHERINE HAMMERSLY,

Plaintiff and Appellant,

v.

CAPISTRANO ANIMAL RESCUE
EFFORT,

Defendant and Respondent.

G040065

(Super. Ct. No. 06CC09192)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory Munoz, Judge. Affirmed.

Green & Hall, Robert L. Green, John T. Griffin, and Nhataly N. Vu for Plaintiff and Appellant.

Adina T. Stern for Defendant and Respondent.

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Plaintiff Katherine Hammersly brought this action under Corporations Code section 5223 (section 5223) for declaratory relief. In her operative complaint, Hammersly sought “a judicial determination that certain members of the Board of Directors of [defendant Capistrano Animal Rescue Effort (CARE)] have committed either fraudulent or dishonest acts and/or have acted in gross abuse of authority or discretion, all to the detriment of CARE, and in a manner warranting removal from office[.]” The trial court deemed the lawsuit moot and granted summary judgment to CARE. We affirm. An action under section 5223 cannot be maintained to remove individual directors who are no longer on the board.

FACTS

CARE is a nonprofit public benefit corporation. (See Corp. Code, § 5110 et seq.; *Van De Kamp v. Gumbiner* (1990) 221 Cal.App.3d 1260, 1276.) Hammersly was elected as CARE’s “Foster Coordinator” on August 22, 2005, which apparently entitled her to a seat on CARE’s board of directors. CARE’s board of directors voted to remove Hammersly from her position as “Foster Coordinator” in March 2006.

Hammersly filed a complaint against CARE and “DOES 1 through 100” in August 2006; the operative first amended complaint against the same defendants was filed in November 2006. Hammersly’s sole cause of action is for declaratory relief to address an alleged controversy between Hammersly and CARE. Hammersly alleges in the first amended complaint that “certain members of the Board of Directors of CARE” committed fraudulent and/or dishonest acts, as well as gross abuses of authority or discretion. The complaint and first amended complaint identify the following individuals as members of CARE’s board of directors: Erin Kutnick, Philip Schwartz, Dave Murphy, Marsha Schwartz, Mark Rottman, Randy Mendoza, Alan Brown, and Terri Backes. The first amended complaint alleges misconduct by certain directors listed

above, but never specifies which directors Hammersly wishes the court to remove from office.

CARE moved for summary judgment on various grounds. Hammersly conceded as “undisputed” three key facts listed in CARE’s separate statement. First, “Erin Kutnick, Phillip Schwartz, Dave Murphy, Marsha Schwartz, Mark Rottman, Randy Mendoza, Alan Brown, and Terri Backes are no longer members of CARE’s Board of Directors.” Second, “[t]he current members of CARE’s Board of Directors are Mike Eggers, Matt Gaffney, Diane Bathgate, David Swerdin and Charles Rae.” Third, “[n]either Mike Eggers, Matt Gaffney, Diane Bathgate, David Swerdin nor Charles Rae were directors as of August 18, 2006.”¹

The court granted CARE’s motion in January 2008, ruling CARE “carried its burden of establishing that there is no actual controversy requiring declaratory relief, since the board members in question are no longer in office. Plaintiff has not provided any additional evidence showing a triable issue of material fact.”

DISCUSSION

Hammersly asserts her lawsuit is not moot because the directors she seeks to remove could easily be reelected to the board unless the court bars such directors from reelection under section 5223, subdivision (a). Indeed, she claims Philip Schwartz (one of the directors identified in the first amended complaint) “reassumed his position on the board at the last general election in August 2008.”

We review the court’s grant of summary judgment de novo and “independently examine the record to determine whether triable issues of material fact exist.” (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767.)

¹ Each of the new directors was elected to the board at an August 2007 meeting at which time each of the old directors resigned.

Section 5223, subdivision (a), provides with reference to public benefit corporations: “The *superior court* of the proper county *may*, at the suit of a director, or twice the authorized number (Section 5036) of members or 20 members, whichever is less, *remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or discretion* with reference to the corporation or breach of any duty arising under Article 3 (commencing with Section 5230) of this chapter, *and may bar from reelection any director so removed* for a period prescribed by the court. The corporation shall be made a party to such action.” (Italics added.)

“A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief.” (*Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503.) Hammersly conceded in her opposition to CARE’s separate statement that none of the board members identified in her first amended complaint were still acting as directors of CARE. Moreover, no material facts bearing on the question of the current composition of CARE’s board were introduced by Hammersly in her declaration submitted in opposition to CARE’s motion for summary judgment. The court, therefore, could not remove from office any of the directors identified as engaging in alleged misconduct under section 5223. Hammersly’s action is moot. Hammersly’s observation that several of the former directors continue to serve as officers in CARE is irrelevant to our mootness analysis; section 5223 does not authorize the court to remove a corporation’s current officers from their positions.

We agree with the trial court’s conclusion that it could not allow the case to proceed under section 5223 merely to ““bar from re-election any director so removed for a period prescribed by the court.”” Section 5223, subdivision (a), does not authorize a court to “bar” an individual from reelection as a director without having first removed the director for misconduct as specified in the statute. A court may only bar directors who have been “so removed,” not directors who left office without a judicial determination of misconduct.

Finally, we cannot consider Hammersly's representation in her appellate brief that one of the directors she identified in the first amended complaint was reelected to the board in August 2008, months after the court granted summary judgment. This was not the state of the evidence at the time the court granted summary judgment. (See *Havstad v. Fidelity National Title Ins. Co.* (1997) 58 Cal.App.4th 654, 661 [facts not presented below cannot create triable issue on appeal].)²

² We need not reach the question of whether Hammersly had standing (as a director of CARE) to pursue this action under section 5223, although we note Hammersly essentially admitted she was no longer a director of CARE by conceding “[t]he current members of CARE’s Board of Directors are Mike Eggers, Matt Gaffney, Diane Bathgate, David Swerdin and Charles Rae.” Hammersly appears to be under the mistaken impression that standing must only be established at the commencement of an action. In fact, standing is jurisdictional and must be present at every stage of a lawsuit. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438.) We also note the failure of Hammersly’s first amended complaint to comply with basic principles of pleading and due process. Apparently, Hammersly misconstrued the final sentence of section 5223, subdivision (a) (“The corporation shall be made a party to such action”), to mean that *only* the corporation should be named as a defendant in an action under section 5223. Although not explicitly stated in section 5223, it should be apparent to anyone familiar with our adversary system that the individual directors whom Hammersly wishes removed should have been named as defendants. Hammersly mentions eight alleged directors in her pleadings. She does not specify anywhere in the first amended complaint, however, which directors she sought to remove from office. Section 5223, subdivision (a), establishes a cause of action to remove directors from the board for cause. The cause of action is not against the corporation. The corporation must be named as a “party” to an action filed under section 5223, subdivision (a). But this does not imply that the corporation should be named as the only adverse party to plaintiff(s), or even that the corporation is necessarily adverse to the plaintiff(s) bringing the action.

DISPOSITION

The judgment is affirmed. CARE shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.